U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: February 19, 1999

Case No. 1999-INA-43

In the Matter of:

RICCIUTI'S
Employer,

on behalf of:

ADAN BENITEZ
Alien

Certifying Officer: Richard E. Panati
Philadelphia, PA

Appearance: Charles Darrow Yates, Esq.

Before: Holmes, Lawson and Wood
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) issued a Final Determination

[1]The following decision is based on the record upon which the CO denied certification, including the Notice of Findings (NOF), rebuttal and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

(FD) denying the application, the Employer requested review pursuant to 20 CFR § 656.26.[2]

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

THE PROCEEDINGS

Employer seeks to fill the position of Cook in its Italian restaurant with DOT Title Cook, Specialty, DOT #313.361-026, a wage offer of $11.47 per hour, job duties of:

> Prepares, cooks, seasons, soups, salads, meats, vegetables, desserts, and other foodstuffs for consumption according to recipe. Use ovens, broilers, grills, roasters, and steam kettles and other kitchen utensils. (AF 44)

Other special requirements included:

> Must be able to get along with customers, supervisors, and other employees. Must be clean and neat. Must be available for weekend, holiday and evening shift work. Flexible hours. Must be able to work independently and with minimal supervision. Must have verifiable references. Employer checks references. Must be able to work quickly. When required must be able to accept and ask for help. (AF 44)

and job requirements of two years of experience in the job offered or two years of experience in the related occupation of Prep Cook, Assistant Cook.

The application was denied by the CO on the basis that employer's experience requirement was found to be unduly restrictive. (AF 6) In the NOF, employer was advised by the CO that the position was reclassified from Cook, Specialty, Foreign Food 313.361-030 SVP 7 to Cook, Specialty 313.361-026 SVP 5 which requires six months up to and including one year of combined education, training and experience. The nature of the employer's business, which

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

was found to be primarily a pizza and sandwich shop and the limited number of foreign food selections which required limited preparation time and skill, were cited as the basis for the reclassification of the DOT title. (AF 6, 14) In addition, according to the CO, the preparation of the foreign foods listed on the menu, did not require extensive training in cooking, and since the menu was standard, the preparation of the food was redundant in nature. (AF 6, 14) Employer was advised that its classification of the position as Cook, Specialty, Foreign Food was not well suited for the advertised position; and, the combination of duties encompass those of Cook, Specialty, Baker, Pizza, and Sandwich Maker, all which require less than the two years of experience which is listed by employer. (AF 14-15). In rebuttal, employer contended that the title Cook, Specialty, Foreign Food best described the available position and that an alternate title of Cook (hotel & restaurant) with an SVP of 7 would require at least two years of the requisite training and experience. (AF 9-10). The CO determined that the position had been correctly reclassified and that employer's experience requirement exceeded those defined in the DOT and labor certification was denied.

CONTENTIONS ON APPEAL

On appeal, employer contends, among other things, that the job was properly classified as a Cook, Specialty, Foreign Food. (AF 1). Employer maintains that the offered position requires greater responsibilities and a greater knowledge of cooking than the positions described by the CO. (AF 1)

DISCUSSION

The NOF had stated that:

> The employer appears to be primarily a sandwich and pizza shop which serves a very limited number of foreign (Italian) food selections. The foreign foods which are listed (e.g., pasta, lasagna, and eggplant parmigiana) do not require extensive training in cooking in order to prepare and cook. The preparation of these food items does not correspond with the job duties of a Cook, Specialty, Foreign Food - 313.361-030 as stated in the DOT: (AF 14)
> ****
> Your position appears to be a <u>combination of duties</u>, encompassed in the DOT definitions for (1) Cook, (2) Baker, Pizza, and (3) Sandwich Maker -- occupations which have an SVP of 5 or less. (AF 14) (underlining added)

and then after setting out the DOT description of those 3 occupations:

> determined that the Cook, Specialty (DOT 313.361-026) is the most appropriate classification. The SVP for this position is 5, 6 months up to and including 1 year of combined education, training and experience. Therefore, the application is cited for an UNDULY RESTRICTIVE JOB REQUIREMENT violation. (AF 15)

but did not set out the section violated or any corrective action such as, for example, amendment of the restrictive job requirement or proving business necessity for combination of duties or excessive experience.

After initially concluding that a combination of duties was involved, it would have been appropriate to have directed employer to prove business necessity. Had the CO not so concluded and instead determined that Cook, Specialty with an SVP of 5 was the proper classification, then employer should have been given the opportunity to reduce the requirements and readvertise or prove business necessity. Instead, the CO failed to state any corrective action. The NOF must give notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects. *Downey Orthopedic Medical Group,* 87-INA-674 (Mar. 16, 1988) (*en banc*). An adequate notice of deficiencies should identify the section or subsection allegedly violated, the nature of the violation, the evidence supporting the challenge, and instructions for rebutting or curing the violation. The NOF must identify which section or subsection of the regulations the employer allegedly violated. *Flemah, Inc.*, 88-INA-62 (Feb. 21, 1989) (*en banc*). The NOF is inherently defective in failing to specify the violation and means of correction.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **REMANDED** for further action consistent with this decision.

For the Panel:

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JAMES W. LAWSON
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk

Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

Judge Holmes dissenting:

I don't disagree that the CO should state specific regulations violated, but he has stated the reasons clearly and Employer should know. This is not the case, in my opinion to chastise the CO for not being perfect in his NOF. On the other hand, clearly if the two-year requirement for Specialty Cook is permitted, Alien would not qualify since he has no prior experience in Italian cooking. He is a Salvadorian national, who has formerly done Peruvian cooking and some other non-specialty. Moreover, if the Specialty, Cook, Italian is permitted, the alternative requirement of Prep or Assistant Cook would not be valid qualifying experience under *Kellogg*. I would affirm the CO.

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JOHN C. HOLMES
Administrative Law Judge

Judge Wood concurring:

I agree with Holmes' and the CO's rationale, but I agree with the decision that the Employer should have been given the opportunity to establish business necessity for the restrictive requirement.

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PAMELA L. WOOD
Administrative Law Judge